IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 102 OF 2004

1. Mr. R. K. Chawla,
   Director, M/s. Goa Food & Pharma(P) Ltd.
   109, Kundaim Industrial Estate,
   Kundaim, Ponda, Goa.

2. M/s. Goa Food & Pharma(P) Ltd.,
   (Registered under the Companies Act,1956
   109 Kundaim Industrial Estate,
   Kundaim, Ponda, Goa. ... Applicants

versus

1. M/s. Goa Antibiotics & Pharmaceuticals Ltd.
   (A Government of Goa Undertaking)
   through its Attorney,
   Mr. Gerald John Fernandes,
   Head of Personnel & Administration,
   Tuem, Pernem, Goa.

2. State of Goa,
   through Public Prosecutor,
   High Court, Panaji. ... Respondents

Mr. S. M. Singbal, Advocate for the Applicants.

Mr. J. P. D'Souza, Advocate for Respondent No. 1.

Mr. S. N. Sardessai, Public Prosecutor for Respondent No. 2.

CORAM : V. M. KANADE, J.

DATE : 6TH JULY, 2005.

ORAL JUDGMENT

The Applicants are the Original Accused. The Applicants are challenging the Judgment and Order passed by the Sessions Judge, North Goa at Panaji in Criminal Revision Application No. 35 of 2000 whereby the Sessions Judge remanded the matter to the trial Court with a direction to dispose of the criminal complaint and decide the application of condonation first and thereafter to proceed with the matter in accordance with law.

2. The brief facts which are relevant for deciding the present Criminal Revision Application are as under:-

The Respondent No.1 is the Original Complainant which is a Government Enterprise engaged in the business of manufacturing Antibiotics and Pharmaceutical items. The Accused Nos. 1 and 2 are the present Applicants and are the Directors of Accused No. 3 which is a Private Limited Company having registered Office at New Delhi. It was alleged by the Complainants that various orders were placed by the Accused for the supply of pharmaceutical goods manufactured by the Complainant and which were accordingly despatched and received by the Accused by various invoices. It was for the payment of the said goods which were supplied that the Accused issued a cheque along with a covering letter dated 19th September, 1998 to

the Complainant. The said cheque, however, after it was deposited by the Complainant was dishonoured with a remark that the "payment was stopped by drawer". The Memo intimating the dishonour of the cheque was dated 18-11-98. So far as one of the cheques which was dishonoured was concerned dated 18-11-98 the Accused sent a Demand Draft for the dishonoured cheque of the same amount. The Complainant issued a legal notice dated 24-11-98 for the dishonour of the cheques and called upon the Accused to pay the total amount of Rs.24,00,000/- within 15 days. Though, the notice was received by the Accused no reply was given to the said notice. A complaint was, therefore, filed against the Accused under Section 138 of the Negotiable Instruments Act, 1891(Act, for short).

3. The trial Court issued process against the Accused by Order dated 6-3-2000 and came to the conclusion that the complaint had been filed in time. Against the said Order, the Accused filed a revision application in the Sessions Court. The Sessions Court came to the conclusion that there was a delay in filing the complaint before the Judicial Magistrate, First Class at Panaji. The Sessions Court held that the trial Court had not taken into consideration the question of delay and further observed that the Magistrate had not called upon the Complainant to explain the delay in filing the complaint. The Sessions Court relying on the Judgment of this Court in the case of **Sou. Surekha Sandip Hajare** v. **Instacomp** (2004 ALL MR(CRI.) 373 came to the conclusion that the Magistrate should consider the question of condonation of delay after an application is filed by the Complainant. The Sessions Court, therefore, remanded the matter back to the trial Court and directed that the

Complainant should file an application in the trial Court for condonation of delay and this application should be first decided by the trial Court and thereafter the trial Court should proceed with the matter in accordance with law.

4. The Original Accused is challenging the said Order of remand passed by the Sessions Court. It is submitted by the learned Counsel appearing on behalf of the Applicants that the Sessions Court had erred in remanding the matter back to the trial Court for considering the question of condonation of delay. He submitted that the provisions of Section 142 as it existed when the complaint was filed did not confer any discretion on the Magistrate to consider any application for condonation of delay. On the contrary, the position was that the Magistrate could not take cognizance of a complaint which was filed beyond a period of one month after the expiry of 15 days from the receipt of the statutory notice sent by the Complainant. He submitted that, therefore, the amendment which was made to Section 142 Sub-Clause (b) which came into effect from 17-2-2002 could not be applied retrospectively to a complaint which was filed before the amendment. He submitted that Section 142 as it existed at the time when the complaint was filed had specifically fixed the outer limit for filing the complaint and no discretion was rested in the Magistrate to accept any complaint which was filed beyond the period of limitation prescribed under Section 142. He submitted that, therefore, the ratio of the Judgment in the case of **Saketh India Ltd. and others** v. **India Securities Ltd.** reported in ((1999) 3 SCC 1) which had interpreted

the unamended Section 142 would not be applicable to the facts of the present case.

5. The learned Counsel appearing on behalf of the Applicants further submitted that the Judgment of this Court reported in **Sou. Surekha Sandip** v. **Hajare(**supra) was not applicable to the facts of the present case as the said Judgment was delivered in view of the facts contained in paras 7 and 17 of the said Judgment. He, therefore, submitted that the Sessions Court had erred in applying the ratio of the said Judgment to the facts of the present case. The learned Counsel appearing on behalf of the Applicants further submitted that the proviso to Section 142 which was amended on 17-12-2002 was liable to be applied prospectively and not retrospectively. He submitted that in the absence of any specific wording in the amendment which was made to Section 142 the amendment was to be made applicable prospectively only. He submitted that if the Legislature wanted to apply the amended proviso retrospectively it would have made a specific reference in the amendment for giving a retrospective effect to the said amendment. The learned Counsel further submitted that if the said proviso was applied retrospectively it would be in breach of the provisions of Article 20 Sub-Clause (1) of the Constitution of India and it would tantamount to creating a new offence which was not available at the time when the complaint was filed. He further submitted that Article 20(1) of the Constitution prohibited ex post facto laws and was designed not to punish a person for lapse or omission which was not considered as an offence at the time of the commission of the crime. In support of the said submission, he relied on a Judgment of the Supreme

Court in the case of **G. P. Nayyar** v. **State(Delhi Admn.)**(AIR 1979 SC 602). He also relied on a Judgment of the Supreme Court in the case of **Commissioner of Wealth-tax** v. **Suresh Seth** (AIR 1981 SC 1106). He also relied on a Judgment of the Supreme Court in the case of **Justiniano Augusto da P. Barreto etc.** v. **Antonio Vicente de Fonseca etc.** (AIR 1969 GOA, DAMAN & DIU 124).

6. The learned Counsel appearing on behalf of the Respondents/Original Complainants on the other hand submitted that there was no violation of Article 20 Sub-Clause(1) of the Constitution of India. He submitted that the said provision would be attracted only in cases where new offences are created for the first time and in respect of cases where there is an enhancement of sentence made by amendment to a statute. He submitted that the bar of Article 20 will be applicable only to these circumstances and would have no application in respect of any procedural change in the law. He submitted that no party had a vested right in respect of procedure and it was always open for the State to change the procedure. In support of the said submission he has relied on a Judgment of the Supreme Court in the case of **Nani Gopal Mitra** v. **State of Bihar** (AIR 1970 SC 1636). He also relied on a Judgment of the Supreme Court in the case of **The State of Bombay** v. **Vishnu Ramchandra** (AIR 1961 SC 307). He also relied on a passage from the commentary of Maxwell on The Interpretation of Statutes Twelfth Edition.

7. The short question which falls for consideration before this Court is whether the proviso to Section 142(b) which was brought into force by

amendment of Section 142 which came into effect on 24-12-2002 was to be made applicable prospectively or retrospectively and secondly whether the said amendment if applied retrospectively would amount to violation of Article 20(1) of the Constitution of India.

8. It is an admitted position that prior to the insertion of the proviso to Section 142(b) of the said Act, a criminal complaint could be filed under Section 138 within one month after the expiry of 15 days from the receipt of the statutory notice by the Accused and thereafter no cognizance should be taken by the Magistrate after the expiry of the said period. Section 142 was thereafter amended on 17-12-2002 and the following proviso was added after Clause (b) of Section 142. The said proviso reads as under:-

> "Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the Complainant satisfies the Court that he had sufficient cause for not making a complaint within such period".

9. As a result of the addition of this proviso it became permissible for the Complainant to file an application for condonation of delay and on such application being filed the Magistrate had a discretion to condone the delay if sufficient cause was made out for not making a complaint within the period prescribed under Clause (b). In the present case, the private complaint was filed on 19-1-1999. On 6-3-2000, the learned Magistrate issued process against the Applicants. In June, 2000, the Applicants/Original Accused filed a

Criminal Revision Application No. 35 of 2000 in the Court of Sessions Judge, North Goa at Panaji. This Criminal Revision Application was decided by the Sessions Court by Judgment and Order dated 3-4-2004. Thus, during the pendency of the Criminal Revision Application the proviso to Section 142 Sub-Clause (b) was inserted by an amendment which was made on 17-12-2002. The questions which falls for consideration before this Court, therefore, will have to be decided in the light of the admitted dates and events mentioned herein above. It would be relevant to take into consideration the provisions of Article 20 Sub-Clause 1 which reads as under:-

> "Article 20(1) - No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence".

10. From the said Article, it can be seen that what is prohibited by Sub-Clause (1) of Article 20 is that firstly it prohibits the conviction of a person of any offence which at the time when the said alleged offence was committed was not considered as an offence and secondly it prohibits the infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed. The Article, therefore, prohibits not only the creation of an offence with retrospective effect but also against conviction under such law. The Supreme Court in the case of **Rao Shiv Bahadur Singh and another** v. **The State of Vindhya Pradesh** (AIR 1953 SC

394) had occasion to consider the said Article 20 Sub-Clause (1) and in para 8, the Supreme Court has observed as under:-

> "8. This Article, in its broad import has been enacted to prohibit convictions and sentences under 'ex post facto' laws. The principle underlying such prohibition has been very elaborately discussed and pointed out in the very learned judgment of Justice Willes in the well known case of - 'Phillips v. Eyre', (1870) 6 QB 1 at pp. 23 and 25 (D), and also by the Supreme Court of U. S. A. in - 'Calder v. Bull', (1798) 3 Dallas 386: 1 Law Ed 648 at p. 649 (E). In the English case it is explained that 'ex post facto' laws are laws which voided and punished what had been lawful when done. There can be no doubt as to the paramount importance of the principle that such 'ex post facto' laws, which retrospectively create offences and punish them are bad as being highly inequitable and unjust. In the English system of jurisprudence repugnance of such laws to universal notions of fairness and justice is treated as a ground 'not' for invalidating the law itself but as compelling a beneficient construction thereof where the language of the statute by any means permits it. In the American system, however, such 'ex post facto' laws are themselves rendered invalid by virtue of Art. 1, Ss. 9 and 10 of its Constitution".

11. The Supreme Court in the case of **Ratan Lal** v. **The State of Punjab** (AIR 1965 SC 444) also considered the question of retrospective

operation of law. The Supreme Court in para 6 of the said Judgment has observed as under:-

> "6. - Every law that takes away or impairs a vested right is retrospective. Every ex post facto law is necessarily retrospective. Under Art. 20 of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence".

12. The Supreme Court thereafter in the case of **Union of India** v. **Sukumar Pyne** (AIR 1966 SC 1206) held that a person accused of the commission of an offence has no vested right to be tried by a particular Court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved and, therefore, if a change in the procedure is made by any amendment it would not be hit by Article 21 of the Constitution of India.

The Supreme Court in para 9 has observed as under:-

> "9. - Mr. Chatterjee, the learned counsel for the respondent, urges that a substantive vested right to be tried by an ordinary Court existed before the amendment, and he relied on Maxwell 11th Edition, p. 217, where it is stated that "the general principle, however,

> seems to be that alterations in procedure are retrospective, unless there be some good reason against it." He says that there is a good reason if the principles of Art. 20 are borne in mind. In our opinion, there is force in the contention of the learned Solicitor-General. As observed by this Court in 1953 SCR 1188: (AIR 1953 SC 394) a person accused of the commission of an offence has no vested right to be tried by a particular Court or a particular procedure except in so far as there is any constitutional objection by way of discrimination or the violation of any other fundamental right is involved. It is well recognized that "no person has a vested right in any course of procedure" (vide Maxwell 11th Edition, p. 216), and we see no reason why this ordinary rule should not prevail in the present case. There is no principle underlying Art. 20 of the Constitution which makes a right to any course of procedure a vested right. Mr. Chatterjee complains that there is no indication in the Amending Act that the new procedure would be retrospective and he further says that this affects his right of appeal under the Criminal Procedure Code. But if this is a matter of procedure then it is not necessary that there should be a special provision to indicate that the new procedural law is retrospective. No right of appeal under the Criminal Procedure Code is affected because no proceedings had ever been started under the Criminal Procedure Code".

13. Thus, it can be seen that the Supreme Court has followed the Judgment given in the case of **Rao Shiv Bahadur Singh** v. **The State of Vindhya Pradesh** (supra) and had held that no person had a vested right in any course of procedure and what was prohibited by the Constitution was an ex

post facto law which created a new offence and not an ex post facto change in the procedure.

14. Thereafter, the Supreme Court in the case of **G. P. Nayyar** v. **State(Delhi Admn.)**(supra) further reiterated the said principle and has observed in para 7 as under:-

> "Thus the appellant cannot object to a different procedure from what obtained at the time of the commission of the offence. The offence that was committed was when Section 5 (3) was in force and by Act 16 of 1967 the procedure is revived. It is not as if the procedure is brought into force for the first time".

In this case also the ratio of the Judgment in **Rao Shiv Bahadur Singh and another** v. T**he State of Vindhya Pradesh(**supra) was followed.

15. Similarly, the Supreme Court in the case of **Anant Gopal Sheorey** v. **The State of Bombay (**AIR 1958 SC 915) again held that no person had a vested right in any course of procedure. The Supreme Court in para 4 has observed as under:-

> "4. - The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right

> in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See Maxwell on Interpretation of Statutes on p. 225; Colonial Sugar Refining Co. Ltd. v. Irving 1905 AC 369 (A). In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective".

16. The Supreme Court in the case of **The State of Bombay(now Maharashtra)** v. **Vishnu Ramchandra** (supra) was considering whether Section 57 of the Bombay Police Act, 1951(Act, for short) was prospective or not. Section 57 of the said Act provided that a person could be externed from a particular place if he had been convicted for various offences under various acts. It was contended before the Supreme Court that the said provision could be made applicable only prospectively and will not be made applicable, unless the conviction on which the action of externment was based, took place after coming into force of that Act. The Supreme Court in para 12 has observed as under:-

> "12. Now, S. 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from the activities of undesirable persons to have been convicted of offences of a

> particular kind. The section only enables the authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities. As observed by Phillimore, J. in Rex v. Austin 1913-1 KB 551 at p. 556.
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> "No man has such a vested right in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."
>
> An offender who has been punished may be restrained in his acts and conduct by some legislation, which takes note of his antecedents; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. The Act in question was thus not applied retrospectively but prospectively".

17. Similarly, the Supreme Court in the case of **Nani Gopal Mitra** v. **State of Bihar** (AIR 1970 SC 1636) has observed that as a general rule alterations in the form of procedure are retrospective in character unless there is a good reason or other why they should not be so treated. The Supreme Court in para 6 of the said Judgment has observed as under:-

> "6. The effect of the application of this principle is that pending cases, although instituted under the old Act but still pending, are governed by the new procedure under the amended law, but whatever procedure was correctly adopted and concluded

> under the old law cannot be opened again for the purpose of applying the new procedure".

18. In the present case also though the complaint was filed on 19-1-1999 and process was issued on 6-3-2000 the application for recalling the process was pending before the Sessions Court upto 2004 by which time the amended proviso to Clause (b) of Section 142 had already come into force and, therefore, the amended proviso clearly had been made applicable since the case was still pending in the Sessions Court. If the criminal complaint had been dismissed on the ground of limitation and no further proceedings had remained pending before the Amendment Act came into force then in such cases the case which had been concluded under the old Act could not be revived after the Amendment Act had come into force. The ratio of the said Judgments which are discussed herein above, therefore, in my view is squarely applicable to the facts of the present case.

19. The amendment to Section 142 Clause (b) permits the cognizance of a complaint by a Magistrate beyond the period of limitation provided a sufficient cause is shown by the Complainant as to why he could not file the Petition in time. A discretion, therefore, is vested in the Magistrate to either condone the delay or to reject the application for condonation of delay. The said proviso, therefore, in my view has merely altered the procedure under which cognizance can be taken by the Magistrate. It does not and cannot be said to create a new offence for a first time after the amendment was affected to Clause (b) of Section 142. Further as observed by the Supreme Court no person can have a vested right in the course of procedure which is required to be

followed. In the present case, the legislation has permitted the Magistrate to consider an application for condonation of delay. Further the wording of the proviso itself indicates that it is meant to apply retrospectively specially in respect of cases which were pending at the time when the Amendment Act was brought into force. Therefore, no old cases which had been concluded on the point of limitation can be revived by taking recourse to the proviso yet it was always open to the Complainant in a pending case to take recourse to the proviso to Clause (b) of Section 142. The contention of the learned Counsel appearing on behalf of the Applicants that the said proviso cannot apply retrospectively, therefore, cannot be accepted.

20. The second contention of the learned Counsel appearing on behalf of the Applicants that the amendment to Section 142 Clause (b) is violative of Article 20(1) also cannot be accepted. The Supreme Court in the case of **Rao Shiv Bahadur Singh and another** v. **The State of Vindhya Pradesh** (supra), **G. P. Nayyar** v. **State(Delhi Admn.)(supra) and Ratan Lal** v. **The State of Punjab**(supra) and in the case of **Anant Gopal Sheorey** v. **The State of Bombay**(supra) has held that a change in procedural law would not be hit by the bar of Article 20(1) of the Constitution of India. The proviso which has amended Clause (b) of Section 142 of the Negotiable Instruments Act merely has given a discretion to the Magistrate to consider an application for condonation of delay. It has not created a new offence but has merely regulated the procedure of taking cognizance by the Magistrate. Such a regulation of procedure does not change the nature of the offence with which the Accused is

tried nor does it create a new offence and is, therefore, not prohibited by Article 20 Sub-Clause(1) of the Constitution of India.

21. Reliance was placed by the learned Counsel appearing on behalf of the Applicants on a Judgment of the Supreme Court in the case of **Commissioner of Wealth-tax** v. **Suresh Seth** (supra). In the said case, the assessee was to file his returns under Section 14(1) of the Act on or before 30th June, 1964. However, he had filed the same on 18th March, 1971. The Wealth-tax Officer had imposed penalty under the Act for late submission of returns. Section 18 is the provision under which the penalty could be imposed by Wealth-tax (Amendment) Act, 1964. The Wealth-tax Officer had prosecuted the assessee for the omission to file Wealth-tax returns on the ground that it was a continuing offence. In the light of these facts, the Supreme Court came to the conclusion that the omission to file Wealth-tax returns was not a continuing offence and, therefore, the penalty had to be computed in accordance with the law in force on the last day on which returns in question had to be filed and not in accordance with the subsequent Amendments which had been made to Section 18(1) of the Wealth-tax Act. In my view, the ratio of the said Judgment will not be applicable to the facts of the present case. In the said case, the return was to be filed by the assessee on or before 30th June, 1964. The return was filed in 1971. The Act was amended between 1964 and 1971. The Wealth-tax Officer had sought to penalise the assessee on the basis of the amended Act. Under these circumstances, the Supreme Court held that the assessee could be penalised as per the law which was in existence on the last day on which the return was to be filed by the assessee. The facts of the present case are entirely

different. The ratio, therefore, will not be applicable to the facts of the present case.

22. The learned Counsel appearing on behalf of the Applicants further relied on a Judgment in the case of J**ustiniano Augusto da P. Barreto etc.** v. **Antonio Vicente de Fonseca etc.** (supra). In the said Judgment the question before the Court was whether the suits instituted by the Respondents therein were barred by limitation. In the said case, Sections 29(2) and Articles 74, 31, 65, 30, 31(a), 32 of the Portuguese Civil Code were repealed after the Limitation Act, 1963 was extended to Diu, Daman, Goa and Articles 529 and 535 of the Portuguese Civil Code were special or local law within the meaning of Section 29 (2) of the Limitation Act, 1963 and, therefore, these Articles were not repealed by virtue of the corresponding Articles 74, 31 and 65 of the Schedule to the 1963 Act. In my view, the ratio of the said Judgment will not be applicable to the facts of the present case.

23. Thus, there is no merit in the submission made by the learned Counsel appearing on behalf of the Applicants. There is no reason to interfere with the Order passed by the Sessions Court. Criminal Miscellaneous Application is, therefore, dismissed.

V. M. KANADE, J.

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